

Supreme Court of the United States

~~OCTOBER~~ Term, 1940

No. 332

Petition For Certiorari

J. W. KOHN, M. S. KOHN, AND J. W. KOHN, Admin-
istrator of the Estate of Carrie Kohn, deceased,
and CENTRAL DISTRIBUTING COMPANY,
INC., (A Defendant).

Petitioners

vs.

CIRCUIT COURT OF APPEALS for the SIXTH
CIRCUIT, with direction to the UNITED
STATES DISTRICT COURT for the Eastern
District of Kentucky, and J. W. MARTIN, et al.,

Respondents

Petition for Writ of Certiorari to the Sixth Circuit Court of the
United States, with directions to the United States District
Court for the Eastern District of Kentucky.

Case of J. W. Kohn, et al., vs. Central Distributing Company, Inc.,
and J. W. Martin, et al, pending in the United States District
Court for the Eastern District of Kentucky.

Cross-Appeal of Central Distributing Company, Inc., for Writ.

The Plaintiffs join in this Petition for the writ.

(Former Appeal No. 177.)

(The law for this Application is U. S. Code 237 (b) 28 U.S.C. 344-7

HARVEY H. SMITH,
Attorney for J. W. Kohn, et al

FRANK M. DAILEY,
Attorney for Central Distributing Company, Inc.

INDEX STATEMENT OF JURISDICTION BRIEF AND EXHIBITS

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Paragraph 2, page 2:

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Paragraph 3, page 3:

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Paragraph 8, page 6:

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Paragraph 9, page 7:

Mortgage note impaired by action of state process and judgment of the court without service. Testimony part of record in U. S. Court on motion for new trial.

Paragraph 10, page 7:

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Paragraph 11, page 8:

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STATEMENT AND BRIEF

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Page 11 — Paragraphs 7—8—9—10—11.

Page 12 — Paragraphs 12—13—14—15—16.

Page 13 — Paragraphs 17—18.

The above covers question of jurisdiction of both the Circuit Court of Appeals and United States District Court for the Eastern District of Kentucky.

BRIEF

Page 13 to 39, inclusive presents record evidence as part of petition and affidavit now made part of the record in the Circuit Court of Appeals.

Exhibits A to Q, pages 40 to 47. Examine these exhibits for explanations of allegations of petitioners. At page 47, sworn statement of supervisor of taxes of Kentucky.

CONCLUSIONS OF LAW

- a. Judgment that adequate remedy existed April 16, 1938, is the law in this case.
- b. Case stands undisposed of as of record, April 11, 1938.
- c. Order of Judge Feb. 27 void for many reasons.
- d. Plaintiffs judgment by default must be entered and issue of damages and amount of taxes only determined by jury.

Supreme Court of the United States

_____ Term, 1940

No. _____

Petition For Certiorari

J. W. KOHN, M. S. KOHN, J. W. KOHN, Administrators of the estate of Carrie Kohn, deceased and Central Distributing Company, Inc. (A Defendant.)

Petitioners,

PETITION for Writ of Certiorari to the Sixth Circuit Court of the United States, with directions to the United States District Court for the Eastern District of Kentucky

vs.

CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT, with directions to the UNITED STATES DISTRICT COURT for the EASTERN DISTRICT OF KENTUCKY, and J. W. MARTIN, et al.

Respondents

CASE OF J. W. Kohn, et al., vs. Central Distributing Company, Inc., and J. W. Martin, et al., pending in the United States District Court for the Eastern District of Kentucky.

CROSS—Appeal of Central Distributing Company, Inc. for Writ.

To The Honorables: *The Judges of the Supreme Court of the United States.*

1. This is an action for a writ of Certiorari in a cause, wherein J. W. Kohn, et al., are Plaintiffs, and J. W. Martin, et al., are Defendants, in the United States District Court for the Eastern District of Kentucky, which said court denied appeal to the Circuit Court of Appeals for the Sixth Circuit, and which Circuit Court of Appeals denied, on May 14, 1940, a petition to allow an appeal in this action to that court to review an order of the United States District Court for Eastern District of Kentucky, which court refused to docket and try the merits, pending in said Court, in the cause of J. W. Kohn, et al., vs. Central Distributing Company, Inc., and J. W. Martin, et al., co-defendants, and the Circuit Court of Appeals also denied appeal and Mandamus.

2. This application is made by the Central Distributing Company, Inc., in its own behalf, because the Plaintiffs are about to sue and recover against the petitioner the sum of three thousand and fifty-five dollars and interest since February 9, 1937, secured by mortgage, duly recorded at all times hereinafter alleged, which mortgage consideration and note executed at said time, your petitioner has admitted was duly executed for a valuable consideration and not paid, and for the further sum of about twenty-two thousand dollars unsecured, owing by petitioner to said plaintiffs for money borrowed and for which claims due, your said petitioner duly assigned all right and title to the assets held by a Trustee in foreclosure on February 16, 1938, and which sum of twenty-two thousand dollars and interest is due the said plaintiffs and unpaid, and who are now about to sue this Petitioner, who asks that, in the above cause the right to recover from J. W.

(NOTE:—Words in parenthesis not quotations.)

Martin, Revenue Commissioner for the state of Kentucky who has unlawfully recovered said sum into his possession, and now holds by attachment and unlawful seizure, all of said sums, but under the laws of Kentucky where an issue is undetermined in an injunction suit, action may be maintained on the merits. And property under control of a Trustee is exempt from attachment.

3. That the Plaintiffs, J. W. Kohn, et al., have agreed to join in this petition in order to force the United States District Court for the Eastern District of Kentucky to docket and try all of said litigated issues set out in their said petition, by proper order of this cause, to the Sixth Circuit Court of Appeals of the United States, which shall be docketed and tried according to law, and that by decree the said United States District Court aforesaid be required to vacate the order refusing trial of this cause entered on the 27th day of February in chambers (1940), denial of trial of the issues, and its order refusing to hear and determine motion for judgment filed by Plaintiffs, April 11, 1938, on which evidence was introduced and no decision rendered by said District Court, as required by law and the rules enacted by this Court for the trial of causes in the said District Court. And also to sustain the Plaintiffs' motion for a summary judgment filed in this cause on the 9th day of February, 1940, and denied by the said District Court.

Said Trustee in charge of attached property not being a party to the suit in the Federal or State Court, not served and not intervening.

4. That in the month of May in 1937, your petitioner, Central Distributing Company, Inc., and the plaintiffs, J. W. Kohn, M. S. Kohn, and J. W. Kohn, Administrators of the estate of Carrie Kohn; (your petitioner being unable to pay said indebtedness to J. W. Kohn, et al.,) entered into an agreement whereby Harry Bayer was to act as Trustee, and was thereby, under the terms of said agreement, placed in charge of said business until the expiration of the license period, the first day of July, 1938. That at the time of the attachment of James W. Martin, which writ was attempted to be served upon your petitioner, Central Distributing Company, Inc., this mortgage was duly recorded in Campbell County in its book of Chattel Mortgages, No. 18, page 491, file 977, said mortgage having been executed on the 9th day of February, 1937. That at the time of the levy of the attachment of the said James W. Martin Harry Bayer was the acting Trustee to administer the assets of said corporation, which were attached, and whose business was closed by action of the said James W. Martin, then Revenue Commissioner of Kentucky, wholly without authority, and seized wholly without legal authority.

5. That thereafter, on the 24th day of February, 1938, J. W. Kohn, et al., filed their suit in the United States District Court for the Eastern District of Kentucky, and duly served the Central Distributing Company, Inc., and the said James W. Martin, then Internal Revenue Commissioner of Kentucky. But the said Harry Bayer, Trustee of said assets, was not served and did not appear as a party to this action, nor did he appear as a party to the attachment action sued out by James W. Martin, on the

16th of February, 1938, nor has he in said capacity ever been a party to either of them. That after J. W. Kohn, et al., brought their action in the United States District Court for the Eastern District of Kentucky, and served the said James W. Martin, the said J. W. Kohn, et al., were made parties to said state action on the application of the said James W. Martin, by amended petition and by order of the Franklin Circuit Court of Franklin County, Kentucky.

6. That the service on the said J. W. Kohn, et al., was by service on Henry Cook, attorney for petitioner, the said J. W. Kohn, et al., being citizens of Ohio, and out of the jurisdiction of the court. That insofar as the Central Distributing Company, Inc., is concerned and interested in this action, it alleges and says, that J. W. Kohn, et al., were not served as provided by the laws of the State of Kentucky, and that they filed their special appearance in the said action, pending in the State Court, long after the suit in the United States District Court had been filed and James W. Martin had been served, and it alleges no service can be had or was had on counsel or J. W. Kohn, et al., that will be binding upon your petitioner, Central Distributing Company, Inc., nor was any action taken in that cause against the said J. W. Kohn, et al., that would be valid and binding upon the said J. W. Kohn, et al., because of the pending action in the United States District Court for the Eastern District of Kentucky, which action was filed prior to the state action, and pleaded as a bar, and constructively the said District Court had judicial possession of the res. That at said time the requisite diversity of citizenship existed, and the said Harry Bayer, a citizen of Cincinnati, Ohio,

Trustee was not made a party to the action either in the United States District Court, or in the state court of Kentucky.

7. That no service whatsoever was had upon Central Distributing Company, Inc., at its place of business in Campbell County, Kentucky, nor on any officer, nor on its service agent, which is required under the practice Code of Kentucky, and the provisions of which Code were binding on the United States District Court for the Eastern District of Kentucky, at all times under the decisions of the Erie Railroad vs. Thompson, a cause rendered by this court.

At the time of the seizing of the res, there was due from your petitioner to the said J. W. Kohn, et al., approximately \$3500.00 in principal, more than the jurisdictional amount required to give the United States District Court for the Eastern District of Kentucky, complete jurisdiction of the res and of the cause of action.

8. That on the 11th day of April, 1938, while said James W. Martin was in default, the plaintiff in this action moved for judgment on the record, and furnished evidence, and your petitioner, by its attorney, Henry J. Cook, joined in said motion, which has never been disposed of. That at said time, and at this time, the law of Kentucky, was as follows:

"For in every case where a mortgage was given before the litigation against the mortgagor (Central Distributing Company, Inc.) was instituted, the mortgagee is entitled to have a decision on his rights rendered, on the basis of the facts and considerations adduced by him (or

them). Obviously, the facts and considerations affecting the trustee, his rights, may be different from those presented to the state court on behalf of the company, because there is a diversity of citizenship, (and was then), the trustee under the mortgage is entitled to have his rights adjudicated and determined." (In the Federal Court). But neither of the Respondent Courts would make findings on such rights.

This also was the binding law under the decisions of the Supreme Court of the United States, as decided in Chase National Bank vs. Norwalk, 291 U. S. 439, and other causes.

9. Therefore, your petitioner alleges that these rights of the said Harry Bayer, Trustee, must be determined under the laws of Kentucky, he being an actual party in interest and without his presence in the court, under the Code of Kentucky, no valid judgment could be rendered against the assets or against either party to this action, and said order of February 27, 1940, is a denial of due process.

10. That the action of the court impaired the contract between your petitioner, Central Distributing Company, Inc., and J. W. Kohn, et al., and destroyed the assets of said contract of said mortgage, rendered recovery impossible, and voided the agreement between your petitioner and the said J. W. Kohn, et al., contrary to the 14th Amendment of the Constitution of the United States. Actually destroyed the assets without due process. Petitioner alleged through motion for judgment, and findings were filed, but neither court would make them.

That certain evidence was produced and before said court, relating to the amount of alleged import

taxes due, and other litigated and disputed matters, and Plaintiffs filed their said demand for hearing and for judgment by default, all of which said District Court refused to hear and determine, and refused to hear and determine a Bill of Exceptions, or make a final order so that appeal could be taken.

11. That your petitioner cannot be exonerated from said obligations until the merits of the action have been determined, being a guarantor of their payment, and said merits of said action will not be determined, and have not been determined by the United States District Court; which recently, on or about the 14th day of May, 1940, refused to make an order allowing said appeal, and the said Circuit Court of Appeals for the Sixth Circuit refused to grant an order allowing appeal, or mandamus, and your petitioner will therefore be denied a hearing in said cause, and will have had no adequate remedy at law, which a three judge court, sitting at Louisville, Kentucky, April 16, 1938, said, petitioners and parties-litigant were entitled to, and did there and then deny a temporary injunction on the *sole ground that such right was certain and adequate*. That there is now due about \$34,000 to plaintiffs, and the said J. W. Martin and the Commonwealth of Kentucky have and hold assets of about \$29,000 principal sum, and about five thousand dollars in interest, for which, under said mortgage executed and assignment made by defendant, Petitioner, here, alleges would, if paid to Plaintiffs, entirely extinguish and pay said debt of Petitioners.

**THE GROUNDS HEREIN ALLEGED FOR THE
WRIT ARE AS FOLLOWS:—**

1. The Sixth Circuit Court of Appeals erred in not ordering, under a writ of Mandamus denied May 15, 1940, to the said Mac Swinford, applied for the restoration of said cause to the trial docket, that the facts therein be disclosed and the merits tried; and from this cause (177) in this court, issued its mandate, which under this action ought to be set aside and relief granted accordingly, and said decree entered April 16, at Louisville, Kentucky also vacated.

2. That the order entered April 16, 1938, being rendered over the objection of Plaintiffs, and your petitioner, out of the United States Circuit Court of Eastern District of Kentucky, was a void judgment of dismissal, no power being conferred by law to hold a legal session of a three judge court out of the territorial limits of the District, and no order of dismissal allowable to said three Judges by law.

3. That no issue was determined there except that the Plaintiffs were not entitled to a temporary injunction as prayed, this being the only issue referred to said three judges, and over which, as matter of law, they could only have jurisdiction; and that as decided, Plaintiffs had an adequate remedy at law, by pending suit in the United States District Court for the Eastern District of Kentucky, which the said Plaintiffs sought to have enforced before the said District Court, and which was on the 27th day of February, 1940, denied by order of Court, attached as Exhibit A.

4. That the effect of said Chamber's order was to deny to your petitioners the right of trial by Jury, and to the Plaintiffs said Constitutional right of Jury trial—Amendment 7, (U. S. C.)

5. That the refusal to sustain the motion for judgment on April 11, 1938, which was joined in by your petitioner, was to determine its liability and its rights in the merits of the action.

6. That it is the first duty of a Federal trial court to determine if any service has ever been had on the parties when a party's property is seized; it to determine whether service was had by any process on any officer of a corporation or according to law; and it was here the duty of said District Court to determine this fact according to the process-service laws of Kentucky; but the said District Court refused so to do, and by its action deprived your petitioners of a trial, and the mortgage note payment, admitted to be valid, and the assignment of import and other unlawful taxes admitted to have been paid by your petitioner; and refusal to determine in this cause the amount of said taxes so paid, since it had been decided that they, the said taxes, were invalid; but whether valid or not, your petitioner had a right, as a cross-action defendant to have said facts determined in a trial of common law issues.

That the common law has been adopted and exists in Kentucky, and did so exist at said time.

That said import taxes collected of your petitioner, were collected by the said J. W. Martin, before movement of the merchandise, and the highest court of

Kentucky has held that taxes on imports collected before arrival of merchandise is void, or collected while merchandise is in transportation is also void, repugnant to Article 1. section 8, Constitution of the : (United States).

7. That the trial of any issue of fact must be tried to a jury under the Constitution of Kentucky, and no ~~waver~~ of this constitutional right has ever been made by petitioners but demanded.

8. The District Court errored in denying Plaintiffs motion for Summary Judgment when parties defendant were in default, entirely for over a year, of pleading, and were under the rules barred after six months to plead or raise any issue in the cause in which petitioner joined.

9. Being in default, when motion for summary judgment was filed, defendant had no rights in the matter, and a jury should have been called to decide the damages which had not been waived but demanded.

10. Only a matter of law remained, and a summary judgment was a matter of right, but denied.

11. The Act of 1936, April 30, provided for a payment of an excise tax of 5 cents per gallon to a manufacturer in Kentucky, and if liquors were shipped out of the ~~x~~state and shipped back into the state, it should pay said excise tax the second time, though said act also provided that no gallon of whiskey should pay a tax more than once; and a part of the taxes here claimed by defendant were such import taxes.

12. The tax collected of Petitioner was partly for imports, paid before shipment and said Act of April 30, 1936, here imposed, violated section 8, Article 1, of the Constitution of the United States, and this sum amounted to approximately twelve thousand nine hundred eighty dollars, and this issue on the merits was denied by the order of the District Court.

13. That other assigned taxes amounted to eleven thousand dollars, due to the assignor before suit filed February 24, 1934, also collectable, the said District Court denied a hearing on these taxes altho by law authorized to be sued for in a Federal Court.

14. That twenty-seven thousand dollars of taxes were due petitioner by assignment, re-assigned to plaintiffs, collected in violation of section 171, 172 and 174 of the Constitution of Kentucky, which issue was not denied by answer.

15. The constitution of Kentucky, section 3 Bill-of-Rights, prohibits collection of taxes on property outside of the territorial limits of the state, and all property must be assessed on its fair cash value, personal and real, and liquors are defined by statute in Kentucky as personal property. Property must be assessed in uniformity, without discrimination, and within the limit of confiscation; the Act of April 30, 1936, was repugnant to these provisions.

16. Motion for new trial and motion to vacate Order of District Judge were denied, Bill of Exceptions disallowed and filing of pleadings disallowed, a denial of due process and equal protection of law, Amendment 14.

17. That the United States Federal Court ruled, and section 780, J. C. provide that after default in pleading for six months, no leave shall be granted a party to plead. Under this rule all of the defendants were in default, except this petitioner, whose motion for judgment was still pending and unacted upon by the court. This motion should be sustained by this Court with allowance for attorneys fee.

18. Judgment by Confession on motion of Plaintiffs should have been sustained or denied on the above grounds, and because of the Act of 1934, with penalties had been repealed.

STATEMENT - BRIEF

1. In this petition, J. W. Kohn, et al., join, by Harvey H. Smith, attorney, Central Distributing Co., Inc., by Frank M. Dailey.

2. This application is made by the Central Distributing Company, Inc., a co-defendant of James W. Martin, Internal Revenue Commissioner, at the time of the filing of the suit of the plaintiffs in the United States District Court for the Eastern District of Kentucky, on February 24, 1938. The applicant, Central Distributing Company, Inc., executed an assignment and a chattel mortgage, valid under the laws of Kentucky, for the sum, altogether, of \$25,000.00, \$3000.00 of this amount being secured by a chattel mortgage, duly filed in Campbell County, in the State of Kentucky, on February 9, 1937, to secure a note executed on said date for the total of \$3000.00 and \$55 at six per cent; all of which is on record in the Clerk's office in Campbell County, Kentucky, at all the times

hereinafter mentioned. Thereafter, in 1938, while the Central Distributing Company, Inc., was in default, and had by agreement previously made, agreed upon a Trustee who was in charge of the business of the said Central Distributing Company, Inc., at the date of attachment, which was a wholesale liquor concern, duly licensed under the laws of the State of Kentucky, said assets were exempt from distraint. That on said date, the 16th of February, 1938, the state of Kentucky, by James W. Martin, its Revenue Agent, claimed that the said Central Distributing Company, Inc., was indebted to it under the act of April 30, 1936, a Revenue tax act, in the sum of \$3100.00. An attachment was sued out in the Franklin Circuit Court for Franklin County, in the State of Kentucky, to recover said sum, with penalties thereon, and the said writ of attachment was delivered to L. C. Sickmeier, Sheriff of Campbell County, Kentucky. That the Plaintiff, J. W. Kohn, et al., filed their petition on the 24th day of February, 1938, in the United States District Court for the Eastern District of Kentucky. This petition prayed for a temporary injunction to restrain the said James W. Martin from seizing the assets then the possessed property of J. W. Kohn, et al.

3. That the Franklin Circuit Court was wholly without jurisdiction to entertain said cause or issue said attachment writ, under the laws of Kentucky, either of the subject matter or parties.

4. That the penalties placed upon said attachment writ amounted to approximately \$1500.00. That these penalties were provided for, under two different sections of Carroll's Statutes in Kentucky, one a

general statute, and the other, under the act of 1936; this being a revenue statute, both penalties were void. The penalty under the general statute, if not void for other reasons, was void because the Constitution of Kentucky provides that when a general act is enacted by the Legislature in respect to any subject matter, no special act can be enacted by the Legislature, so that the provision incorporated as a penalty of twenty per cent under the act of 1936, was void, your petitioner alleges.

5. That no service was ever had on the Central Distributing Company, Inc. The attempt up-to-date, and the action of the Judge of the United States District Court for the Eastern District of Kentucky, denying a trial on the merits of this cause, February 27, 1940, did deprive the Central Distributing Company, Inc., as well as the plaintiffs, of their property, without due process of law. No service was ever had on any officer or the service agent of your petitioner, Central Distributing Company, Inc. As a part of this petition, your petitioner quotes the following writ, which, under the laws of Kentucky, shows no attachment can be sustained, nor has the court jurisdiction to issue any attachment until and when a summons has been issued and served on an officer of a corporation or its service agent. That the certified copy of this attachment is as follows; and shows no summons was so issued:—

"FRANKLIN CIRCUIT COURT

Commonwealth of Kentucky, by and on relation of
James W. Martin, Commissioner of Revenue,

Plaintiff,

vs.

Central Distributing Co., Inc.,..... Defendant

ORDER OF ATTACHMENT

THE COMMONWEALTH OF KENTUCKY

To the Sheriff of Franklin County:

You are hereby commanded to attach and safely keep the property of the defendant, *Central Distributing Co., Inc.*, (*William Ploss, 1038 Monmouth St., Newport, Kentucky—Process Agent.*) in your county, not exempt from execution, or so much thereof as will satisfy the claim of the plaintiff *Commonwealth of Kentucky, etc.* in this action against the said defendant the sum of \$4,468.66 with 6 per cent interest on \$3,191.86 from November 8, 1937 and \$30.00 for the probable cost of this action; and to summons the garnishees, if any, to answer in said action on the 1st day of next April term of this court, and you will make due return of this order as provided by law.

Witness, KELLY C. SMITHER, Clerk of said Court, this 15th day of February, 1938.

KELLY C. SMITHER, *Clerk.*

By D. C."

Came to Hand Feb. 16, 1938 at 10 o'clock A. M. — LOUIS C. SICKMEIER, *Sheriff.* Campbell County, Ky., By Leroy J. Sendelback, D. S.

It is alleged that this attachment was not served on William Ploss, but on Harry Bayer, no officer of the Corporation.

"Executed the within Attachment this 16th day of February, 1938, by delivering a true copy hereof to *Harry Bayer, manager of Central Distributing Company, being the highest officer found in this county.*

LOUIS C. SICKMEIER, *Sheriff of Campbell County, Kentucky.*

By Louis Ewing, D. S.

4. This writ was served on Harry Bayer, who was neither an officer nor an agent of the Central Distributing Co., Inc. The service agent of said corporation is William Ploss, who resided in Campbell County, and was in Campbell County within the reach of the Sheriff when the writ was executed. His testimony, as recorded and filed in the Circuit Court of Franklin County, between the same parties which is pertinent to this issue, is made part of this petition, and is as follows:

Q. Did you ever sign, negotiate a mortgage with J. W. Kohn, or M. S. Kohn, or J. W. Kohn, as administrator of Carrie Kohn?

A. Oh, Kohn. I didn't understand it before.

Q. Yes, Kohn. K-O-H-N.

A. Why, yes. It was a chattel mortgage.

Q. You did not know the Kohns?

A. Yes, sir, I did.

Q. You did not understand the question before?

A. No.

Q. Where did they live, Mr. Ploss?

A. Cleveland.

Q. Do you know the street address in Cleveland?

A. No, I do not.

Q. (Discussing Mr. Bayer). Was he an officer in the company?

A. No, sir. *** I signed the checks.

Q. Did Mr. Bayer have any authority to sign any checks?

A. No, sir.

Q. Who passed on the credit of the customers? Did you pass on it?

A. I passed on it, yes, sir.

Q. Did you take care of the filing of reports,

the necessary export and import forms of the Department of Revenue?

A. That was up to Eleanor Webster. (Vice-President).

Q. Who were the other officers of the company?
A. Eleanor Flannery and Eleanor Webster.

Q. What were their respective positions?
A. Eleanor Webster was Secretary and Treasurer.

Q. How much stock did you have in this corporation?

A. 35 shares. *** I paid cash for it.

Q. Did you take care of the purchasing of stamps, of consumers' stamp tax under the Department of Revenue?

A. Most of the time.

Q. You bought them?

A. Yes, sir. (He was President of the corporation, but he had resigned at the time of the attachment on February 16, and the date of attachment writ).

Q. Did you ever borrow money from the Kohns?

A. Yes, sir.

Q. Did you sign the note as president of the company?

A. Yes, sir.

Q. And to secure that loan you gave them a mortgage that is in the plea?

A. Yes, sir. That's the idea.

Q. What was the purpose of the loan?

A. To use in the business.

(The witness was then shown a paper, Exhibit A, which showed that the corporation had furnished a list of the officers to the Internal Revenue Commissioner, for which the corporation had his acknowledgment.)

Q. Is that a copy of that report? (Exhibit A).

A. Yes, sir.

Q. Did you pay Mr. Bayer a salary for the services that he rendered?

A. Yes, sir."

(The sworn affidavits filed in the case at the time of the application for injunction, by Eleanor Webster and Harry Bayer, are made a part of the record, and are as follows) :

"In Franklin Circuit Court,
Franklin County, Kentucky

J. W. Martin, et al.

vs.

AFFIDAVIT

Central Distributing Company
Commonwealth of Kentucky
County of Campbell

SCT.

Affiant, Eleanor Webster, after being duly sworn, deposes and says that she is director and Vice-President of Central Distributing Company, Inc., a wholesale liquor dealer located at 45 East Eleventh Street, Newport, Kentucky, and that she has occupied that office and position since the formation of the company in July 1936.

Affiant further says that she was in the place of business of said Central Distributing Company, Inc., at 45 East Eleventh Street, Newport, Kentucky, at the time of the service of the attachment on Febraury 16, 1938, on the property of Central Distributing Company.

Affiant has read the foregoing affidavit and avers that it is true in every respect.

ELEANOR WEBSTER,

Eleanor Webster, Vice-President of Central Distributing Company, Inc., 45 East 11th St., Newport, Ky.

Subscribed and sworn to before me this 10th day of November, 1938.

ELSIE M. DEWALD, *Notary Public.*

(S E A L)

My commission expires -10-29-40

"AFFIDAVIT

Commonwealth of Kentucky
County of Campbell

SCT.

Affiant, Harry Bayer, after being duly sworn, deposes and says that on the date of attachment, February 16, 1938, he was neither director, officer or manager of Central Distributing Company, Inc., but was acting as agent of J. W. Kohn, M. S. Kohn and J. W. Kohn, administrators of the estate of Carrie Kohn, deceased, who held the corporation's promissory note in the amount of Three Thousand (\$3000) Dollars, which note was secured by a chattel mortgage on the stock of goods and merchandise, consisting of wines and liquors, the fixtures and all of the assets of said Central Distributing Company, Inc.

Affiant further says that on May 1, 1937, the said J. W. Kohn, M. S. Kohn, and Carrie Kohn had by agreement taken possession of the stock of goods and merchandise consisting of wines and liquors, fixtures, cash register, safes, and all of the assets of said Central Distributing Company, Inc., and simultaneously placed said affiant in charge, as their agent in collecting the amount due them by virtue of said note and chattel mortgage.

Affiant has read the foregoing instrument and avers that it is true in every respect.

HARRY BAYER

Subscribed and sworn to before me this 10th day of November, 1938.

ELSIE M. DEWALD, *Notary Public*.

(S E A L) My commission expires 10-29-40

Bayer was the agent of the Plaintiffs, and had no connection with the company.

5. The return of the attachment writ shows that it was an attachment on the assets of the corpora-

tion, for \$4468.65, for the taxes, with interest on principal claim, \$3191.89. Section 254 of the Code of Kentucky provides that the property must be described in the attachment, petitioner alleges:

"The filing of a petition and service of summons on an officer of the corporation or the service agent at or before the filing of the attachment cannot be waived."

Duncan vs. Griswell, 97, Ky. 546.

"An attachment must be served on an officer of the corporation at its place of business or on the service agent designated by statute (this service agent was William Ploss.) If there is no allegation that a summons has been returned with the endorsement of service on an officer of the corporation or the service agent, attachment is void."

11 B. M. 669.

Hearne vs. Hander, 56 Ky. 479

Section 1358 Carroll's Statutes, and 72nd section of Carroll's Code of Kentucky.

"In order to acquire jurisdiction, the petition must be filed and summons must issue and be served concurrently with attachment or before attachment."

Sec. 2524 Carroll's Statutes.

Petitioner alleges the attachment was sued out under the act of 1934, because the act of 1934 and the act of 1936 must be considered together for a complete operation of the law. The act of 1934, at the time of the filing of the plaintiffs' action had not been repealed, but was repealed on the 7th day of March, 1938, by the Legislature of Kentucky.

It was the law of Kentucky, at that time, that the penalties were remitted by operation of law.

Speckert vs. City of Louisville, 78 Ky. 88.

To show that the corporation was not served nor the service agent, we quote from the record in said court, and make it a part hereof, as follows:

Testimony of Henry J. Cook:

Q. Did you see Miss Eleanor Webster there that date while Mr. Sam Rosenstein and the Sheriff were there, levying on the merchandise of Central Distributing Co., Inc.? (Miss Webster was Secretary and Treasurer).

A. Yes.

Q. You know both of them, do you not?

A. Yes.

Q. Was H. H. Smith there at that time?

A. Yes.

Testimony of Eleanor Webster, examined by H. H. Smith:

"Q. State your name and residence.

A. Eleanor Webster, 342 Bond St., West Covington, Kentucky.

Q. What was your occupation of February last, about the 16th?

A. I was Vice-President, and active, of the Central Distributing Company at Newport, in Campbell County, Kentucky.

Q. I ask you if you were present on the 16th of February, 1938, when the Sheriff of Campbell County levied on all the merchandise of Central Distributing Co., Inc.?

A. I was there in the office all the time when you and Mr. Cook and the attorney and the sheriff were there, when the levy was made. I helped take the inventory.

Q. Did you see the sheriff and Mr. Sam Rosenstein, the attorney for the state there at that time?

A. I saw all of them. Mr. Rosenstein was the attorney.

Q. Was Mr. William Ploss there at that time or had he resigned as President of the Company?

A. Mr. Ploss had resigned as President, but was still the service agent.

Q. Were you in Campbell County all that day?

A. I was there all day and aided in taking the inventory.

Q. You were not served with any paper or summons on that date or any other date, were you?

A. No, sir.

Q. You were the highest officer, as Vice-President that could have been served that day in Campbell County?

A. I was the highest officer in Campbell County or in the state.

Q. Who did Mr. Harry Bayer represent there that day?

A. Mr. Bayer represented the mortgagee; and he was not an officer or manager of the company.

Q. What was his official position, if any, in the Company?

A. No position with the Company.

Q. You were Vice-President of the Company, and in charge at that time?

A. Yes, sir. I was in charge as Vice-President."

Mr. Ploss concurred in Eleanor Webster's testimony:

"Q. What office if any did you ever hold in that Company?

A. I was President and Service Agent.

Q. Did you have any other position with the Company (on February 16)?

A. Well, just service agent, that was all.

Q. How long have you been service agent and are you still service agent?

A. I am still service agent.

Q. Were you in Campbell County at the time that the attachment was brought up there?

A. I was. Yes, sir."

The testimony of H. H. Smith was to the effect:

"I was present at the time the attachment was served, and the inventory made. Miss Webster was there, the Vice-President of the Company."

Affidavit filed September 26, 1939, which according to the testimony filed with the Internal Revenue Commissioner of Kentucky, the 26th day of June, 1937, is given as follows:

"William Ploss, President, 1036 Monmouth Street, Newport, Ky.

R. Webster, Secretary, 711 John St., Covington, Ky.

E. Webster, Vice-President, 711 John St., Covington, Ky."

The assignment of taxes paid by the company was assigned to J. W. Kohn, et al, for money advanced in the business, for which there was no mortgage. This assignment was executed at the direction of the corporation by Eleanor Webster. The amount alleged at said time to be due from the Commonwealth of Kentucky, as testified to by its supervisor of taxes, was \$9039.00. This amount was for the payment to the supervisor of Taxes before the importation of liquors into Kentucky, at the rate of 5c per

gallon. This payment was acknowledged and testified to by Joe Williams, Supervisor of taxes of Kentucky, during the pendency of the injunction suit. The assignment was executed by R. Webster, Secretary of the corporation, to J. W. Kohn, M. S. Kohn, J. W. Kohn, administrator of the estate of Carrie Kohn, on the 4th day of April, 1938.

6. It was the practice of the Supervisor to require your petitioner to purchase permits which permits would give a wholesaler the privilege of importing whiskey into the state of Kentucky. These permits were paid for at the rate of 5c per gallon and prior thereto, certain permits were purchased from other wholesalers to amount of \$3100, but the first record permit shown by the books of the state was October 31, 1936. These permits purchased, continue from day to day up to and including April 4, 1938, and as shown by the books of the corporation were \$9175.06.

7. Owing to the fact that there was no service of attachment or summons, the then attorney of Central Distributing Co., Inc., Henry J. Cook, made a motion on or about April 4, 1938, in the United States District Court for the Eastern District of Kentucky, which is as follows:

"Comes now the Central Distributing Co., Inc., by its attorney of record, Henry J. Cook, and moves that its motion to dismiss said attachment be adjudicated by this court, it agreeing that the said note sued on in the sum of \$3000 be and is admitted to be a valid mortgage on the assets attached and moves that the court adjudicate the rights of the cross-plaintiffs in respect to the lien claimed by the state of Kentucky, and

also determine what interest, if any, this defendant has in said money assets which cross-plaintiffs claim a lien upon and under an assignment made by it to cross-plaintiffs, before it be required to further plead to this action or file its said answer to the petition of said cross-plaintiffs.

(Signed) Henry J. Cook"

The court refused to pass on this motion. The amount of the taxes in said injunction proceedings were also testified to by Harry Bayer, Joe Williams, State Tax Supervisor, who acknowledged that they had notice of the chattel mortgage in the sum of \$3000 (recorded).

"Q. Now, Mr. Bayer, what was your position, if any, with the Company at that time?

A. I was by agreement to serve as bailee and look after and continue the business for the purpose of buying merchandise and selling it, and for the purpose of trying to preserve the business so that they (the company) could pay this note and mortgage out of the profits to be derived."

The witness, John Marcum, testified for the state, and said that the volume of business done per annum amounted to 85,897 cases.

"Q. By whom are you employed, Mr. Marcum?

A. Field Representative, Department of Revenue (Kentucky).

Q. Will you designate by the number of cases, based on the state purchase report?

A. 85,897 cases. We found that he had sold 81,001 cases in export.

Q. What taxes were due on the amount of liquor sold in Kentucky?

A. \$15,275.52."

Mr. Philip McGee, as a representative of the Commonwealth, testified to substantially the same thing as the witness, John Marcum.

Mr. Joe Williams testified as follows:

"Q. Now designate in your own way for the record just how you collected that tax, the import tax.

A. Inasmuch as the law provides that a Kentucky importer must pay the import tax and have a permit in his possession before the merchandise is imported, they have adopted a system of having the Kentucky importer purchase permits from the Department in advance, at which time they pay the import tax on the quantity of merchandise called for in the permit. These permits are issued in triplicate, one copy is kept by us, one sent to you, (the purchaser) and the third copy to the out-of-state shipper, depending upon your request. The out-of-state shipper must deliver the copy we send to him, along with the merchandise for transportation, and when the whiskey is imported, is delivered in Kentucky, he must endorse the copy of his permit so as to specify the exact amount of whiskey delivered. Permit may be used until the full quantity called for upon the face of the permit has been shipped. The copy of the permit must be returned to the Department within 90 days.

Q. Did you exercise the authority as a tax board to limit the amount of these permits?

A. No.

Q. Your practice is that the tax in that way, is based upon approximately 5c per gallon, so as to equal the amount of tax. If it should turn out that the tax money would be owing the Central Distributing Co., Inc., (then what)?

A. You are asking me for something that I am not competent to answer.

Q. Are you relying purely upon the tax act itself (1936)?

A. Purely.

Q. The tax act you refer to did not create a wholesaler?

A. No, sir.

Q. So that the license, under the 1934 act exists as a legal entity until the last day of June, of this year?

A. That is right.

Q. In this case here they are seeking to collect penalties of 20% (the statement of J. W. Martin's petition). Is that right?

A. No, sir. The (correct) bill is for 10% under one act and 10% penalty under another.

The Court: Just let him state what penalties were imposed.

Q. The Department imposed a 20% penalty and any additional penalty was charged by him (referring to counsel Mr. Leary)?

A. I passed on neither. That was a legal question."

The penalties therefore, were illegally imposed, whether by Williams, or by Leary, or by Marcum or by McGee. The petition alleges that no penalties can be imposed in Kentucky under the revenue act of the type of the 1936 act. This act, standing alone, was inoperative because there would be no licenses without the act of 1934, which was void because it was a beverage act enacted by the Legislature in violation of amendment 7 of the Constitution of the State of Kentucky, which prohibited the sale of liquor at all as a beverage in Kentucky.

8. The plaintiffs, J. W. Kohn, et al, in this action, sought to have the temporary injunction against J. W. Martin, the then Revenue Commissioner. Although the defendant, J. W. Martin, on April 11, 1938, was in default, the District Court ordered the cause to be transferred to the three Judge court sitting at Louisville, Kentucky—the order signed.

Evidence was introduced in support of the motion for judgment filed by the plaintiffs on the 11th day of April, 1938, in the Eastern District Court. Although the plaintiffs had moved for a three judge court, they, with this defendant, objected to the hearing at Louisville on April 16th, which, among other objections, was that it could not be held outside of the United States District territorial limits of the Eastern District of Kentucky. This exception is found in the original cause filed in the Supreme Court of the United States, in Case 177, the record, at pages 28 and 29 thereof, in language as follows:

“To all of which petitioners object and except.”

In said judgment it was distinctly understood and adjudicated that the original motion filed April 11, 1938, had not been determined and would be determined after the issue of injunction was passed upon by the three judge court. This motion is as follows:

“Come now the petitioners, and move the court for judgment on the amended petition of petitioners, and in this behalf submit evidence.

(Signed) Smith & Schuberth
Henry J. Cook.”

The original petition was filed on February 26, 1938. Under the Kentucky laws, plaintiff alleges, the defendant, J. W. Martin and the commonwealth of Kentucky must answer in 21 days, and the amended petition being dated for all legal purposes of the date of the filing of the original petition, the time elapsed was one month and 15 days on April 11th. No leave was ever asked or granted for the defendants, J. W. Martin, to plead. Thus, the default became absolute under the rules of the Supreme Court of the United States and under the procedure rules of the state of Kentucky. In the Kentucky Code, 20 days, and under the rules of the United States Supreme Court, 20 days. Therefore, there was no jurisdiction of the three judge court in the city of Louisville, on April 16, to consider the matter of an injunction.

9. Your petitioner alleges that an appeal was taken from the judgment of that court on April 16, denying the injunction. The motion to dismiss was a demurrer and was not sustained on the ground that the plaintiff's petition did not state a cause of action for the relief asked, but that adequate law-remedy existed—Jurisdiction not there challenged.

10. Plaintiff alleges that the question of consumers taxes levied at \$1.04 per gallon, supporting affidavits having been filed in the court, was undetermined and contested as a violation of section 171, 172 and 174 of the Constitution of Kentucky.

That also the constitutionality of the act of 1936, was void as a revenue tax act because it provided for an import tax levied upon merchandise before being moved into the state and during transit, and before

it had been mingled with the assets subject to taxation in Kentucky, under its tax laws, as decided by its courts. The foreclosure of the note and mortgage then remained, under the issue as made by the pleadings, to be determined. That the question of attorney's fees for the plaintiff remained to be determined. And your petitioner alleges that its constitutional rights are invaded because, at the present time, the plaintiffs are attempting to proceed against the collection of approximately the sum of \$33,000, and that there is no final judgment which this petitioner can plead in estoppel of said proceedings because no final judgment has ever been entered in this cause, determining the merits.

11. That on the 27th day of February, 1940, the United States District Court for the Eastern District of Kentucky, denied the motion of the petitioners to try the merits of this action and docket the case, under the authorities submitted to the court, that the Central Distributing Co., Inc., as principal, for these issues had never been disposed of, and that the denial of the trial of these issues was a denial of the right of trial by jury, and that the court having never considered, and refused to consider, the service on your petitioner, such denial amounted to a denial of due process of law; and having decided that the plaintiffs had an adequate remedy at law in sustaining the defendants, J. W. Martin's motion to dismiss the petition for want of equity, that this was a decision that the issues *must be determined at law on the merits*. That no appeal of estoppel was filed in the case because there was no final adjudication of the merits, and no plea of res judicata appeared from the record or was pleaded.

Auditor must be plaintiff to collect taxes. (Sec. 10-1934 Act)

12. Notwithstanding motion for findings was filed, the court made no findings. That at the time the plaintiffs made the motion to try this cause on its merits and docket the same, the said J. W. Martin had separated himself from the office of Internal Revenue Commissioner of Kentucky, for longer than six months prior to said hearing, admitted of record, and the court permitted said hearing and participation by the Commonwealth of Kentucky, and J. W. Martin, when under the decisions of the laws of Kentucky, and of the Supreme Court, Rule 25, and under section 780 of the Judicial Code, and decisions of this court, annotated, they could not participate in said trial or the said cause, and were at all times in default, which refusal to sustain findings or make them, and which refusal to strike the names of co-defendants counsel from the cause denied petitioner of due process of law.

HAC. 764

13. The plaintiff alleges that the refusal of the court to dismiss this action, in respect to the defendants and their pleas was a denial of due process, and a positive refusal of the District Court for the Eastern District of Kentucky, to consider the cause at all in compliance with the Federal Statute designated, and refusal to consider the rules of decision in Kentucky, or the Code of Kentucky, which provide that by operation of the laws of Kentucky, the action could not proceed, and said decision was a denial of the decision of the Circuit Court for the Sixth Circuit, controlling on the said District Court for the Eastern District of Kentucky, and that any judgment rendered by the court, except an ex-parte judgment was void, and must, by operation of law be vacated. That the court thereafter refused to permit

the filing of a summary judgment, which motion for summary judgment is attached hereto, as a part of this record, showing that the seizure of the property was without service of summons or without jurisdiction in the said Franklin Circuit Court, as hereinbefore alleged. That furthermore, the court had refused to adjudicate any question relating to the merits of this action, and that said summary judgment was supported by affidavits showing that said Franklin Circuit Court had no jurisdiction to seize the property.

14. That the plaintiff, J. W. Kohn, et al, became parties to this action, and brought this action in the United States District Court for the Eastern District of Kentucky, before any action in respect to the interests of the Kohns was precipitated or filed in the Franklin Circuit Court of Franklin County, and plaintiff alleges that it is the law of Kentucky, as well as the law of this jurisdiction that a prior pending action filed in the United States Court gives said court control of the assets, approximately \$2700 for final adjudication, whether it is in possession of the res or not, and under the laws of Kentucky, Code and decisions, the res was in the constructive possession of the United States District Court for the Eastern District of Kentucky, and though binding on said court, it ignored the positive command of said laws, refusing to order possession into the jurisdiction of said court.

15. That the court refused to determine the action for damages, undetermined in said cause of action, whereby, without service of process on your petitioner, Central Distributing Company, Inc., it

lost its entire business, which business was worth an income of forty thousand dollars annually, and lost its license to do business by an arbitrary and false construction of the laws of Kentucky by a Commission created in violation of the Constitution of Kentucky, the Act of March 7, 1938, being unconstitutional, containing at least twenty-five sections, each of which is a violation of the Constitution of Kentucky as decided by its highest court, and repugnant to the 14th Amendment to the Constitution of the United States.

(a) That the said Act provides for transportation by special provision, when a general Act covers that subject, violating section 59 of the Constitution of Kentucky, section 214 of the Constitution of Kentucky, and section 3 of the Bill of Rights, which prohibits preferential and/or special privileges being extended to any man, corporation or class of men — the said Act extending special privileges to railroads for transportation of liquors, section 2554-b.

(b) That said act authorizes the Internal Revenue Commissioner to create office and fix the salaries of employees, which power may only be exercised by the legislature.

(c) That said Act fixes the retail price of liquors, when the Constitution of the United States prohibits the exercise of said power as an infringement of Article I, section 8 of the Constitution of the United States, and the Anti-Trust laws of Kentucky, and the United States.

(d) That said Act provides that no person shall be allowed to partake of liquors unless he pays

for the said liquors, and that the retailer is indictable if he sells to a person not supporting his family.

(e) That the Statute, when analyzed, contains such a large number of violations of the Constitution of Kentucky, that it would not be enforceable.

(f) The Act of April 30, 1936 and 1938 are both unconstitutional statutes, violate section 8, Article I, of the Constitution of the United States, in that it provides for an import tax to be paid before liquors may be shipped into Kentucky, and though the excise tax of 5 cents is paid to manufacture liquors in Kentucky, if it be necessary to transport out of Kentucky and back through Kentucky to its delivery destination, it shall pay 5 cent tax the second time.

(g) That a part of the tax here sought to be collected is an import tax, void under the state and federal decisions of law, but the petitioner has been denied the constitutional right of trial by jury to determine this fact, United States Constitution, Amendment 7, thereof.

That each and all of the Revenue Act of 1936 contains provisions for the collection of discriminative, confiscatory taxes, which lack uniformity, and all of which were assailed as unconstitutional under the Kentucky Constitution, which the petitioner was denied the right to try out to court and jury, and thus now is threatened with liability to pay the entire sum due plaintiffs which is now in the hands of the Commonwealth of Kentucky and J. W. Martin, and for which sums it has not had a hearing to determine title as provided by due process of law. That under the Constitution of Kentucky denial of a jury right of

trial may not be denied on any disputed fact; the right of trial by jury shall never be suspended (section 7) and in these respects the arbitrary action of the District Court in such refusal and the refusal of the Circuit Court of Appeals to grant Appeal, and the refusal of the United States District Court for the Eastern District of Kentucky to grant appeal, deprives the petitioner of due process as provided by Amendment 14 and Amendments 4, 5 and 7 of the Constitution of the United States. That the contract note secured by mortgage in loan of funds to your petitioner is a contract that cannot be impaired, and is enforceable against this petitioner in the courts of Kentucky, and in the United States District Court of Kentucky, but the arbitrary action of the Circuit Court of Appeals in denying appeal and the arbitrary action of the United States District Court in denying appeal, and the decision of said District Court in denial of trial on the merits, deprives your petitioner of its property without due process of law and of the equal protection of the laws clause, Amendments 4 and 5 of the Constitution of the United States, and the 14th Amendment of the Constitution prohibits the tax statutes above as enforced.

Your petitioner, therefore, as a matter of right, demands an impartial trial of the issues presented by its pleading, and its motion for judgment as afore-alleged, and if denied, then a trial of said issues alleged against it to a jury as prescribed by federal and state law. Section 7, United States Constitution and Section 7, of the Kentucky Constitution, inclusive of damages by cross-action.

15. That the said penalties for which judgment is now sought and had against its property, are not imposed as provided by law, which requires penalties to be fixed only at a hearing provided by law, either judicial or administrative in nature, and both. That this right has been denied, and according to testimony, the said penalties are fixed by attorneys and field auditors without legal authority and under invalid statutes.

That in the Act of 1936, one who fails to pay taxes so imposed either import or domestic, may be imprisoned for more than a year and fined, which debt is a financial obligation prohibited of prison sentence under the Constitution of Kentucky. That the wholesaler pays said taxes.

16. That your petitioner is entitled to its adequate remedy by law. It therefore prays this court for a writ to the Circuit Court of Appeals to certify by the record, its denial of appeal, and that it order the District Court for the Eastern District of Kentucky to certify its order denying the docketing of this cause, and that when the same are certified to this court that each of said orders be vacated and set aside, and that the order of this court and the order of April 11, 1938, be vacated, denying the injunction, and that the mandate in this action be revised and returned to the Circuit Court of Appeals for the Sixth Circuit, with directions to direct the United States District Court for the Eastern District of Kentucky to docket the cause, and to sustain the motion for judgment on April 11, 1938, to strike the name of J. W. Martin from the cause of action as a defendant, and that

otherwise, judgment be entered according to the application of the said petitioner, J. W. Kohn et al, for a judgment as prayed in said petitioner's original and amended petition, to-wit:

The amount of said mortgage note, of principal and interest, the sum of \$55.00 in cash, and the amount of taxes due the said J. W. Kohn, et al, both of import and consumer's taxes, which have been paid by your petitioner, and that the respondent, United States District Court for the Eastern District of Kentucky, enter judgment on the amount found by proof, which has been paid by your petitioner, for the recovery of said taxes, and proper allowance for reasonable attorneys' fees to be paid to Frank M. Dailey, and all costs expended by your petitioner in preparing this appeal, and such other relief as this court may deem proper; and for final judgment against J. W. Martin and other defendants in necessary acquittal of liability of your petitioner.

Respectfully submitted,

FRANK M. DAILEY,

Attorney for Petitioner.

Exhibits A, B, C, D, E, F, G, H, J, K, L, M, N, and O. are attached herewith as part of this petition, which support its allegations.

Frank M. Dailey.

A F F I D A V I T

STATE OF KENTUCKY
COUNTY OF CAMPBELL

SCT.

Eleanor Webster deposes on oath and says that she is the Vice-President of the Central Distributing

Company, Inc., and as such is well acquainted with the facts hereinbefore alleged and stated in this petition for writ of certiorari, and that upon her information and belief these facts she verily believes to be true.

ELEANOR WEBSTER.

Subscribed and sworn to before me, Elsie M. Dewald,
a Notary Public in and for the County of Campbell,
State of Kentucky, this 22 day of May, 1940.

ELSIE DEWALD, *Notary Public*.

My commission expires 10-29-40.

J. W. KOHN, et al.,

No. 4132, United States District Court for the Eastern
District of Kentucky.

vs.

CENTRAL DISTRIBUTING COMPANY, INC., et al.,
No. 8554, United States Circuit Court of Appeals
for the Sixth Circuit.

EXHIBIT A.

"This cause coming on to be heard on Plaintiff's motion to restore the above-captioned case to the docket of this court, and it being made to appear to the court that the Supreme Court of the United States, in its opinion reported in 306 U. S. 531 (Case No. 177) has affirmed the judgment of the three judge court in dismissing the petition herein; it is ordered and adjudged that plaintiff's motion should be and the same is now overruled. The court being of the opinion that plaintiff's motion to restore the within case to the docket should be overruled, it necessarily follows that plaintiff's motion for summary judgment and plaintiff's motion for judgment for the reason that no substitution for a resigned officer was made by the Commonwealth of Kentucky (in Kentucky, within six months), a defendant, which motions have been tendered, should be refused (filing) and it is so ordered.

(Signed) MAC SWINFORD,

Judge, United States District Court
Eastern District of Kentucky.

CERTIFIED

A. B. ROUSE, Clerk

Feb. 27, 1940

EXHIBIT B.

Order entered April 12, 1938 in the United States District Court for the Eastern District of Kentucky:

"It is ordered this cause be set down for hearing at Federal Court Bldg., Louisville, Kentucky, on April 16, 1938, 10 o'clock A. M., before a three judge court." (The balance of the order is omitted).

EXHIBIT C.

United States Circuit Court of Appeals for the Sixth Circuit, May 15, 1940:

"It is ordered that the petition of J. W. KOHN, et al, for allowance of an appeal in this cause be and the same is denied."

(Signed) J. W. MENZIES, Clerk."

EXHIBIT D.

Motion and Affidavit in the United States District Court for the Eastern District of Kentucky:

"Comes now Harvey H. Smith, counsel for plaintiffs' and suggests to the court that he is duly informed by official information from the State of Kentucky that J. W. Martin, on July 1st, 1939, resigned as Revenue Commissioner of said state, and he suggests that inasmuch as his successor is not qualified as a party in this action, this action continue in the name of the Central Distributing Co., Inc., and Louis C. Sickmeier, as defendants, and that the court make the proper order in this case, so continuing said cause against the defendants and as representatives

of the State of Kentucky for all of the purposes of the proceedings in this case. That the Auditor of the State be made a party to this action."

(This motion was denied in the preceding order of the court E. & A.)

EXHIBIT E.

United States District Court for the Eastern District of Kentucky, April 23, 1940:

"Motion for Bill of Exceptions denied."

EXHIBIT F.

United States District Court for the Eastern District of Kentucky:

"This day came Harvey H. Smith and offered for filing Motion for New Trial, Motion to Correct Imposed Judgment and Make Proper Findings in the above-styled case. It appearing to the Court that an order dismissing this case was entered on April 16, 1938, motion for new trial is overruled.

(Signed) MAC SWINFORD, Judge

March 13, 1940

Certified

A. B. ROUSE, Clerk."

EXHIBIT G.

Amended Petition in the (Franklin Circuit Court), filed May 2, 1938, by Samuel M. Rosenstein, of counsel for Commonwealth of Kentucky, by and on relation of J. W. Martin, Commissioner of Revenue, asking that J. W. Kohn, et al, be made parties to this action.

EXHIBIT H.

May 21, 1938, Petition for Removal to the United States District Court for the Eastern District of Kentucky, filed by J. W. Kohn, et al., and signed "Smith & Schuberth," joined by Henry J. Cook, Attorney for Central Distributing Co., Inc.

EXHIBIT I.

Order of the court May 21, 1938, Removing.

EXHIBIT J.

Motion to Quash Service, signed by Henry J. Cook, Attorney for Central Distributing Co., Inc., filed November 2, 1938, in the Franklin Circuit Court.

EXHIBIT K.

Motion to Quash Service on Central Distributing Co., Inc., and dismissal of writ of service from the record herein, filed November 2, 1938:

"Reserving their objections to the jurisdiction of this court, and moving to quash the service on the grounds set out, etc."

EXHIBIT L.

Special demurrer filed by J. W. Kohn, et al, on November 2, 1938. The demurrer was denied on the ground that there was no misjoinder of parties plaintiffs, (J. W. Kohn, et al, not yet having been served in the manner provided by law.)

EXHIBIT M.

Motion to dismiss on the 4th day of November, 1938, by J. W. Kohn, et al:

"Move that this attachment be dissolved, and this petition be stricken and the cause of action be dismissed. That it appears from the record that this court is wholly without jurisdiction."

"The grounds of said motion being that this court has no jurisdiction over the subject matter of this action. That this court has no jurisdiction of the defendant, as shown by the record. That there has been no service on the defendant, Central Distributing Co., Inc., and no summons issued or served by any court that had jurisdiction of the subject of the action, and that this demurrer ought to be sustained, and the attachment action dissolved, and the cause of action dismissed.

EXHIBIT N.

Affidavit of Harry Bayer, November 10, 1938:

"Affiant further says that on May 1, 1937, said J. W. Kohn, M. S. Kohn, and Carrie Kohn had by agreement taken possession of the stock of goods and merchandise consisting of wines and liquors, fixtures, cash registers, safes, and all of the assets of said Central Distributing Co., Inc., and simultaneously placed said affiant in charge as their agent, in collecting the amount due them by virtue of said note and chattel mortgage. Affiant has read the foregoing instrument and avers that it is true in every respect.

(Signed) Harry Bayer.

Subscribed and sworn to before me this 10th day of November, 1938.

(S E A L)

(Signed) Elsie M. Dewald,
Notary Public.

My commission expires 10-29-40.

(The said action of the Commonwealth of Kentucky, on relation of J. W. Martin, plaintiff, having no plaintiff at the time of the trial, judgment was void and there is now pending only the cross-petition of J. W. Kohn, et al, against the Central Distributing Co., Inc., in the Court of Appeals of Kentucky).

The above constitutes all of the record that is important in this action, showing that the United States District Court for the Eastern District of Kentucky first had jurisdiction of the res by the action of February 26, 1938, Six months before the Kohns specially appeared in the Franklin Circuit Court in the State of Kentucky. There is no record of proper service of the Kohns in the action and there is no record of proper service on the Central Distributing Co., Inc., in the United States District Court for the Eastern District of Kentucky.

EXHIBIT O.

"United States District Court
Eastern District of Kentucky
At Covington

J. W. Kohn, et al,

vs.

Central Distributing Co., Inc., et al.

Comes now the Plaintiff and tenders its Motion to Strike, and it appearing to the Court that the above styled case is no longer on the docket the Motion cannot be entertained and is ordered placed with the record but not filed.

MAC SWINFORD, Judge.

April 1, 1940."

EXHIBIT P.

Motion to Dismiss — Filed April 16, 1938:

"Come the defendants, Commonwealth of Kentucky, by and on relation of James W. Martin, Commissioner of Revenue, and Louis C. Sickmeier, Sheriff of Campbell County, Kentucky, and move the Court to dismiss plaintiffs' petition as amended; and as reasons for said motion state that plaintiffs herein have a plain, adequate and complete legal remedy and that this Court is without jurisdiction to grant the relief prayed for in plaintiffs' petition as amended.

Wherefore, these defendants pray that the petition as amended herein be dismissed.

Hubert Meredith, Attorney General,
Commonwealth of Kentucky, by William
Hayes, Assistant attorney General.
Clifford E. Smith, J. J. Leary,
General Counsel, Department of Revenue."

EXHIBIT Q.

Judgment and Order Allowing Appeal:

"This cause coming on for hearing before the Honorables Elwood Hamilton, United States Circuit Judge, John D. Martin, United States District Judge, and Mac Swinford, United States

District Judge, on the motion of the petitioners for a temporary and permanent injunction, and the petitioners being present by counsel H. H. Smith and Henry Cook, and respondents being present by counsel J. J. Leary and William Hayes, Assistant Attorney General for the Commonwealth of Kentucky; and the Court being fully advised, it is ordered, adjudged and decreed that the temporary and permanent injunction of petitioners be denied, and the motion of petitioners for said injunction be and is hereby overruled; and the petitions of the petitioners are dismissed, to all of which petitioners object and except.

It being the opinion of the court that the legislative act of 1934, entitled "Kentucky Alcohol Control Act," furnishes petitioners an adequate remedy in Section Twelve (12) (Fol. 47) of said Act to contest the validity of said Act and to recover any taxes collected from them by the State of Kentucky under said Act.

Petitioners, by their counsel, announced that they wished to appeal to the Supreme Court of the United States from the judgment, order and decree of this Court, and give notice in open court to that effect; which appeal is now granted and allowed by the Court.

Enter this 16th day of April, 1938.

Elwood Hamilton, United States
Circuit Judge

John D. Martin, United States
District Judge

Mac Swinford, United States
District Judge."